# Score Option Sdn Bhd & Anor v Duar Tuan Kiat & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)-2127 OF 2011
SULONG MATJERAIE, MOHD HISHAMUDIN AND ABDUL WAHAB PATAIL JJCA
19 DECEMBER 2012

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*Companies and Corporations — Receivers and managers — Action against — Whether action by directors against receivers and managers without latter's consent bona fide — Whether action interfered with functions of receivers and managers — Whether action neither challenged appointment of receivers and managers or raised impropriety on their part — Whether directors had locus standi to maintain action*

D

The first and second respondents ('the R & M') were receivers and managers of the appellant companies. They were appointed by the third respondent ('MBB') pursuant to three debentures executed by the appellants in MBB's favour creating fixed and floating charges over their movable and immovable assets as security for the grant of banking facilities. A piece of land ('the land') owned by the first appellant was also charged to MBB as security. The second appellant wholly owned all the shares of the first appellant. When the R & M entered into an agreement to sell the land to the fourth respondent, the appellants filed an action to, inter alia, injunct them from proceeding with the sale. Before the application for the interlocutory injunction ('encl 4') could be heard, the R & M applied, vide encl 13, to set aside the appellants' writ on the ground the directors of the appellants did not have locus standi to file the action against them. The High Court allowed encl 13 and, consequently, dismissed encl 4 without hearing it. The court found, inter alia, that although the appellants were named as plaintiffs in the action, it was actually brought by the directors of the appellants without the consent of the R & M. The directors appealed to the Court of Appeal against the High Court's decision.

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**Held,** dismissing the appeals in respect of both encls 13 and 4:

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(1) Once receivers and managers were appointed, directors no longer had authority over the company or to act on its behalf. The action in the instant case was not a bona fide one against the receivers and managers but an interference with their functions and did not fall within the category of actions which the directors of the companies might have commenced without consent (see paras 5 & 9).

I

(2) The writ stemmed from the directors' disagreement with the action of the receivers and managers to sell the land to the fourth respondent on the ground the appellants' problems with MBB resulted from the fourth

respondent's breach of a joint venture agreement with the appellants before the receivers and managers were appointed. The basis of objection had nothing to do with the propriety or otherwise of the actions of the receivers and managers to realise the security. It was not a challenge to the appointment of the receivers and managers themselves or of any impropriety on their part (see para 9).

(3) There was no practical purpose of reinstating the writ found to have been commenced without authority and which had been struck off. As to whether the respondents ought to have applied to strike it out under O 18 r 19 and not O 12 r 7 of the Rules of the High Court 1980, that was purely a procedural and not a substantive question which was not raised before the High Court. The directors were thus estopped from raising that issue at the appeal stage (see para 17).

(4) (per **Mohd Hishamudin JCA, dissenting**) The appeal should be allowed with costs and encl 4 should be sent back to the High Court to be heard on its merits as it was not fair to shut out the appellants without giving them their day in court (see paras 30–31).

(5) (per **Mohd Hishamudin JCA, dissenting**) Encl 13 was not clear as to the exact nature of the grounds relied upon by the receivers and managers. It was vague and meaningless. Neither was the ground elaborated upon in their supporting affidavit. The reason for alleging the appellants had no locus standi to file the action was vague. The affidavit did not explain specifically in what way the action was tantamount to an interference with their functions and affecting the assets of the appellants (see paras 33–34 & 40).

(6) (per **Mohd Hishamudin JCA, dissenting**) In view of the unfair and unethical conduct of the receivers and managers in pursuing their setting aside application and the vagueness of the reasons given, the High Court ought to have dismissed their application with costs (see para 41).

**[Bahasa Malaysia summary**

Responden-responden pertama dan kedua ('P & P') adalah penerima dan pengurus perayu syarikat. Mereka telah dilantik oleh responden ketiga ('MBB') menurut tiga debentur yang disempurnakan oleh perayu-perayu bagi pihak MBB yang mewujudkan gadaian tetap dan terapung ke atas aset-aset boleh alih dan tak boleh alih sebagai cagaran untuk pemberian kemudahan perbankan. Sebidang tanah ('tanah tersebut') yang dimiliki oleh perayu pertama juga telah digadaikan kepada MBB sebagai cagaran. Perayu kedua memiliki sepenuhnya semua saham perayu pertama. Apabila P & P memasuki satu perjanjian untuk menjual tanah tersebut kepada responden keempat, perayu-perayu telah memfailkan tindakan untuk, antara lain, menghalang mereka daripada meneruskan jualan itu. Sebelum permohonan untuk injunksi interlokutori ('lampiran 4') dapat didengar, P & P telah memohon, melalui

lampiran 13, untuk mengetepikan writ perayu-perayu atas alasan pengarah-pengarah perayu-perayu tidak mempunyai locus standi untuk memfailkan tindakan terhadap mereka. Mahkamah Tinggi membenarkan lampiran 13, dan berikutan itu, menolak lampiran 4 tanpa mendengarnya. Mahkamah mendapati, antara lain, bahawa meskipun perayu-perayu telah dinamakan sebagai plaintif-plaintif dalam tindakan itu, ia sebenarnya telah dimulakan oleh pengarah-pengarah perayu-perayu tanpa persetujuan P & P. Pengarah-pengarah tersebut telah merayu kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi.

**Diputuskan,** menolak rayuan-rayuan berkenaan kedua-dua lampiran-lampiran 13 dan 4:

(1) Setelah penerima dan pengurus dilantik, pengarah-pengarah tiada lagi kuasa ke atas syarikat atau untuk bertindak bagi pihaknya. Tindakan dalam kes ini bukan bona fide terhadap penerima dan pengurus tetapi campur tangan dengan fungsi mereka dan tidak terangkum dalam kategori tindakan yang mana pengarah-pengarah syarikat mungkin telah mulakan tanpa persetujuan (lihat perenggan 5 & 9).

(2) Writ itu wujud kerana pengarah-pengarah tidak bersetuju dengan tindakan penerima dan pengurus menjual tanah tersebut kepada responden keempat atas alasan masalah perayu-perayu dengan MBB adalah disebabkan pelanggaran perjanjian usahama oleh responden keempat dengan perayu-perayu sebelum penerima dan pengurus dilantik. Asas bantahan tiada kaitan dengan kewajaran atau sebaliknya tindakan penerima dan pengurus untuk merealisasikan cagaran itu. Ia bukan satu cabaran kepada pelantikan penerima dan pengurus sendiri atau apa-apa salah laku di pihak mereka (ihat perenggan 9).

(3) Tiada tujuan praktikal untuk mengembalikan writ yang didapati telah dimulakan tanpa kuasa dan yang telah dibatalkan. Berhubung sama ada responden-responden patut memohon untuk membatalkannya di bawah A 18 k 19 dan bukan A 12 k 17 Kaedah-Kaedah Mahkamah Tinggi 1980, ia satu persoalan prosedur dan bukan substantif yang tidak ditimbulkan di hadapan Mahkamah Tinggi. Pengarah-pengarah tersebut dengan itu diestopkan daripada menimbulkan isu tersebut di peringkat rayuan (lihat perenggan 17).

(4) (oleh **Mohd Hishamudin HMR, menentang**) Rayuan itu patut dibenarkan dengan kos dan lampiran 4 patut dihantar balik kepada Mahkamah Tinggi untuk didengar atas meritnya kerana ia tidak adil untuk menafikan perayu-perayu peluang untuk didengar di mahkamah (lihat perenggan 30–31).

(5) (oleh **Mohd Hishamudin HMR, menentang**) Lampiran 13 tidak jelas berhubung sifat sebenar alasan-alasan yang digunakan oleh penerima dan

pengurus. Ia adalah taksa dan tidak bermakna. Alasan itu juga tidak dijelaskan dalam afidavit sokongan mereka. Sebab untuk mengatakan perayu-perayu tiada locus standi untuk memfailkan tindakan adalah tidak jelas. Afidavit itu tidak menjelaskan secara khusus dalam cara apa tindakan itu sama seperti campur tangan dengan fungsi mereka dan menjejaskan aset-aset perayu-perayu (lihat perenggan 33–34 & 40).

(6) (oleh **Mohd Hishamudin HMR, menentang**) Berdasarkan perilaku penerima dan pengurus yang tidak adil dan tidak beretika dalam meneruskan penepian permohonan mereka dan sebab-sebab yang tidak jelas yang telah diberikan, Mahkamah Tinggi patut menolak permohonan mereka dengan kos (lihat perenggan 41).]

***Editorial Note:*** This case supersedes the previous publication of the same in [2013] 4 MLJ 556.

**Cases referred to**

*Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; [1995] 4 CLJ 551, CA (refd)

*Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] 2 All ER 896, CA (refd)

*Tudor Grange Holdings Ltd and Others v Citibank NA and Another* [1991] 4 All ER 1, Ch D (refd)

**Legislation referred to**

Companies Act 1965 s 108
National Land Code
Rules of the High Court 1980 O 12 r 7, O 18 r 19, O 33 r 2

**Appeal from**: Civil Suit No 22 NCVC-224 of 2011 (High Court, Kuala Lumpur)

*MR Kumar (Hiu Yeat Fong with him) (Vaasan & Chandran) for the appellants.*
*TM Eng (Clestina Chin with him) (Jal & Lim) for the first and second respondents.*
*SY Ng (Brian Sim with him) (Raja Darryl & Loh) for the third respondent.*
*CL Wong (Skrine) for the fourth respondent.*

**Abdul Wahab Patail JCA (delivering majority decision of the court):**

**[1]** The appeal before us appears as appeals by Score Option Sdn Bhd and Austral Development Sdn Bhd against the decision on 13 July 2011 where the Kuala Lumpur High Court:

(a) allowed with costs the first and second defendants' application to set aside the plaintiffs' writ pursuant to O 12 r 7 of the Rules of the High Court 1980 ('RHC 1980'); and

(b) dismissed the plaintiffs' summons for interlocutory injunction, inter alia, to restrain the first, second and third defendants from certain actions.

**[2]** It was submitted for Score Option Sdn Bhd and Austral Development Sdn Bhd that the issues raised are whether the High Court has the jurisdiction to strike out the appellants'/plaintiffs' claim under O 12 r 7 of the RHC for want of locus standi, and in any event, whether the appellants/plaintiffs have the locus standi to commence the action.

**[3]** We address the second issue first.

**[4]** The learned judge in the High Court had drawn a clear distinction between Score Option Sdn Bhd and Austral Development Sdn Bhd as companies ('the companies') and their directors. She had done so because although the writ bore the names of the companies as plaintiffs, it was an action by the directors without the consent of the receivers and managers who had been appointed.

THE LAW

**[5]** The effect of an appointment of a receiver stems from the object of obtaining the appointment of a receiver that is to place the assets of the company under the protection of the court, and to prevent everybody except the receiver, as an officer of the court, from in any way intermeddling with them. A manager is appointed when it is desired not merely to protect the assets, but also to carry on a trade or business to protect the goodwill since a receiver has no power to carry on the business. Once receivers and managers have been appointed, directors no longer have authority over the company or to act on behalf of the company. Since an action could interfere with the functions of the receivers and managers, as well as impact upon the assets of the company, the consent of the receiver and manager is necessary if the directors seek to conduct legal proceedings on behalf of the company against a third party. See *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] 2 All ER 896.

**[6]** The directors have residual authority to take action against the receiver and manager, the party appointing the receiver and manager for any misconduct or if the appointment of receiver and manager is contested. See *Tudor Grange Holdings Ltd and Others v Citibank NA and Another* [1991] 4 All ER 1.

THE WRIT OF SUMMONS

**[7]** It is first necessary to examine what the writ of summons is about.

**[8]** A perusal of the writ shows that the named plaintiffs are the companies themselves and not the directors on behalf of the companies. Now, if a writ of summons is commenced by the company against a third party, the writ will be intituled as such. If it is commenced by the directors of the company against a third party, the intitulement will reflect that. If, as in this case, the action is commenced by the directors against the receivers and managers of the company to challenge the actions of the receivers and managers, it would be intituled as an action by the directors of the company against the receivers and managers, the party who appointed them and any third party involved. It is incumbent upon a party to set out the intitulements in clear and unambiguous terms and not leave it to the court to make a preference. But neither before the High Court nor in this court was there any application to amend the intitulements. The action remains, as evident from the writ, purporting to be by the companies. Since it was neither commenced by the companies' receivers and managers, nor by the directors with the receivers' and managers' consent, the intitulement is all wrong. The effect of a wrong intitulement is illustrated in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; [1995] 4 CLJ 551 (CA).

**[9]** The action sought to be commenced under the writ stems from the directors' disagreement with the action of the receivers and managers to sell the companies' charged property to the fourth respondent on the grounds that the companies' problems with the third respondent resulted from the breach by the fourth respondent of a joint venture agreement dated 22 August 2002 with the companies before the receivers and managers were appointed. The basis of objection has nothing to do with the propriety or otherwise of their actions as the receivers and managers of the companies to realise the security for the third respondent. It is not a challenge as to the appointment of the receivers and managers themselves or of any impropriety on their part. We agree with the learned judge, that the action is not a bona fide action against the actions of the receivers and managers but an interference with the functions of the receivers and managers and does not fall within the category of actions which the directors of the companies may commence without consent.

**[10]** Since it was not properly commenced, we describe the action and the present appeal as maintained by the directors of the companies.

ORDER 12 R 7 OR O 18 R 19 OF THE RULES OF THE HIGH COURT

**[11]** We now address the first issue.

**[12]** Order 12 r 7 provides:

7 Application to set aside writ, etc. (O 12 r 7)

(1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering appearance, apply to the Court for an order setting aside the writ or the service of the writ, or notice of the writ, on him, or declaring that the writ or notice has been duly served on him or discharging any order giving leave to serve the notice on him out of jurisdiction.

(2) An application under this rule must be made by summons.

**[13]** Counsel MR Kumar, for the directors of the companies, submitted that the respondents' application in encl 13 in the High Court was defective. It was submitted that the application to set aside the directors' writ of summons ought to have been made under O 18 r 19 of the RHC and not O 12 r 7. His reasoning is that the first and second respondents are not questioning the jurisdiction of the High Court to hear the plaintiffs' writ, but are saying that the claim filed by the companies' directors are obviously unsustainable because they are not clothed with authority to institute the action because receivers and managers had been appointed over the companies.

**[14]** The latter part of the submission that the assertion of lack of locus standi effectively means the companies' directors' writ is obvious unsustainable is founded upon the following:

> The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no locus standi or cause of action why did they not invoke O 18 r 19 or O 33 r 2 of the Rules of the High Court 1980 (RHC) because if they succeed in their applications on any one of these orders the civil suit and the injunction itself would both collapse. We would demonstrate why invocation of O 18 r 19 or O 33 r 2 is the correct procedure by reference to authority (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 (SC))

and

> We are unanimously of the view that both the High Court and the Court of Appeal adopted the wrong approach to an O 18 r 19 application because with the respondent having no capacity to sue in the first place, the originating summons simply cannot stand and, therefore it falls under the category of a case which is obviously unsustainable (*Lembaga Kumpulan Wang Simpanan Pekerja v Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 MLJ 65; [2000] 3 CLJ 81 (FC)).

**[15]** In this case, the grounds given for the application by the respondents are:

(a) *plaintif pertama dan plaintif kedua merupakan syarikat-syarikat dalam*

*penerimaan dan pengurusan, di mana penerima dan pengurus telah pun dilantik bagi plaintif pertama dan plaintif kedua pada 29 Januari 2010;*

(b) *pengarah-pengarah di dalam plaintif pertama dan plaintif kedua tidak mempunyai locus standi untuk memfailkan tindakan ini memandangkan mereka telah gagal untuk memenuhi segala syarat-syarat yang perlu untuk membolehkan mereka memulakan tindakan ini terhadap defendan pertama dan kedua, sebagai penerima dan pengurus plaintif pertama dan plaintif kedua; dan*

(c) *oleh itu, writ saman ini difailkan secara salah dan patut diketepikan.*

**[16]** In our view, while counsel is correct that the application in encl 13 effectively says that the writ commenced by the directors is obviously unsustainable, we are now confronted by an error upon an error, and have to make a choice between:

(a) striking out encl 13 with the result that the writ commenced by the directors without authority become reinstated; and

(b) maintaining the striking out of the writ.

**[17]** The choice ceases to be a conundrum when it is observed that the first alternative, being pursued by the directors, flows from the reasoning that the writ ought to be struck out through O 18 r 19 and not O 12 r 7, that the writ is obviously unsustainable for the reason the directors did not have the authority to commence the writ action. That being so, there is no practical purpose in reinstating the writ found to have been commenced without authority and which had already been struck off. In decision the order to be made, a court must take into consideration whether the order made to bring the particular issue before it to a conclusion. Furthermore, even though whether the respondents ought to have applied under O 18 r 19 or O 12 r 7 is a legal question, it is purely procedural and not substantive. Since the purpose of procedural rules are to facilitate expeditious and economical resolution of legal proceedings. The objection ought to have been taken in the High Court, and where it had not been taken and the application had proceeded to a conclusion in the High Court, in our view it is a fit and proper case that the directors be estopped from relying upon it at the appeal stage.

**[18]** Accordingly, we dismissed the appeal in respect of the decision on encl 13. It follows that the appeal on encl 4 is also dismissed. We ordered that the costs be paid by the directors.

**Mohd Hishamudin JCA (dissenting judgment):**

**[19]** This is an appeal against the decision of the High Court of Kuala

Lumpur in allowing the first and second respondents' application (encl 13) to set aside (under O 12 r 7 of the Rules of the High Court 1980) the appellants'/plaintiffs' writ action against the respondents; and in dismissing the appellants' application (encl 4) for interlocutory injunction.

**[20]** It would appear from the grounds of judgment of the High Court judge that encl 4 (the interlocutory injunction application) was not heard on the merits. The hearing, as it appears from the learned judge's grounds of judgment, only focused on the setting aside application (encl 13). Having allowed the setting aside application, the learned High Court judge then proceeded to dismiss the interlocutory injunction application (encl 4) as a matter of course.

**[21]** At the outset, Encik Kumar, learned counsel for the appellants, applied that the appeal in respect of encl 13 (the setting aside application) be heard first. He informed the court that should the court allow the appeal in respect of encl 13, he would ask this court to send back the case to the High Court for the hearing of encl 4 on the merits.

**[22]** The first appellant company (Score Option Sdn Bhd) was the registered owner of a piece of land (of 200 acres in size) situated in the District of Petaling, Selangor ('the impugned land').

**[23]** The second appellant company (Austral Development Sdn Bhd) wholly owns all the shares of the first appellant.

**[24]** In 2003 the third respondent/third defendant (Malayan Banking Bhd) provided a loan facility of RM28.8m to the first appellant. A facility agreement was executed on 17 December 2004 ('the first facility').

**[25]** In 2005 the third respondent provided banking facilities in the sum of RM67m to the second appellant/second plaintiff and two separate facility agreements were executed, one dated 20 July 2005 and the other dated 25 January 2006 (these facilities collectively will be referred to as 'the second facility').

**[26]** As security for the first and second facilities, the first appellant charged the impugned land to the third respondent in accordance with the provisions of the National Land Code ('the NLC') and s 108 of the Companies Act 1965.

**[27]** In addition, the appellants also executed three deeds of debenture (all dated 10 April 2008) in favour of the third respondent, creating a fixed and floating charge over their moveable and immoveable assets.

**[28]** In 2010 it is alleged that events had occurred upon which the power to appoint receivers and managers under the debentures became exercisable. The third respondent, in exercising the power, appointed the first and second respondents (Duar Tuan Kiat and Adam Primus Varghese) as receivers and managers of the appellants. Thereafter, the first and second respondents, as receivers and managers, entered into a sale and purchase agreement with the fourth respondent/fourth defendant (Glomac Alliance Sdn Bhd) to sell the impugned land, in spite of the fact that the land was charged to the third respondent under the NLC.

**[29]** In their statement of claim the appellants are seeking various injunctive reliefs, inter alia, to restrain the respondents from proceeding with the sale and purchase agreement dated 21 January 2011 entered by the first and second respondents with the fourth respondent.

**[30]** In my judgment, this appeal should be allowed with costs; and that encl 4 be sent back to the High Court to be heard on merits.

**[31]** In my judgment, I do not think that it would be fair to shut out the appellants/plaintiffs without giving them their day in court.

**[32]** To begin with, it is not clear in the summons in chambers at encl 13 as to the exact nature of the grounds of the first and second respondents' setting aside application, purportedly made pursuant to O 12 r 7 of the Rules of the High Court 1980. The first and second respondents ('the respondents'), in their summons in chambers, merely state:

> 2. Pengarah-pengarah di dalam Plaintif Pertama dan Plaintif Kedua tidak mempunyai locus standi untuk menfailkan Tindakan ini memandangkan mereka telah gagal untuk memenuhi segala syarat-syarat yang perlu untuk membolehkan mereka memulakan Tindakan ini terhadap Defendan Pertama dan Kedua, sebagai Penerima dan Pengurus Plaintif Pertama dan Plaintif Kedua.

What is meant by:

> … gagal untuk memenuhi segala syarat-syarat yang perlu …?

**[33]** Thus the ground in the summons in chambers (encl 13) is vague and meaningless.

**[34]** Now, one would have thought that the 'ground' (or 'grounds') would be elaborated by the respondents in their supporting affidavit. For, in their summons in chambers, they have stated:

Alasan-alasan selanjutnya adalah seperti yang dinyatakan di dalam Afidavit Duar Tuan Kiat yang diikrarkan pada 7.4.2011 dan difailkan dalam Tindakan ini.

**[35]** Yet, unfortunately, this is not to be the case. For, in para 5 of the respondents' affidavit in support (affidavit of Duar Tuan Kiat, affirmed on 7 April 2011), one would note that what is being alleged is merely as follows:

> 5. Defendan Kedua dan saya telah dinasihatkan oleh Peguamcara kami dan kami sesungguhnya percaya bahawa Pengarah-Pengarah Plaintif tidak mempunyai sebarang locus standi untuk memulakan Tindakan terhadap Defendan Kedua dan saya memandangkan Pengarah-Pengarah Plaintif telah gagal untuk memenuhi syarat-syarat yang diperlukan untuk membolehkan Tindakan dimulakan terhadap Defendan Kedua dan saya sebagai Penerima dan Pengurus kepada Plaintif-Plaintif. Peguamcara kami akan membentangkan tentang isu undang-undang semasa perbicaraan perkara ini.

**[36]** Thus, the reason for alleging that the appellants have no locus standi to file the writ action against the respondents is still not disclosed in the respondents' supporting affidavit.

**[37]** In view of the unfair and unethical position taken by the respondents and their solicitors, the appellants in their affidavit in opposition (that of Chek Jamal bin Baharom, affirmed on 19 April 2011), took a firm stand and responded in the following manner:

> 8. I wish to state that the First and Second Defendants should by right notify the Plaintiffs specifically as to why the Plaintiffs do not have the locus standi and this should be supported by case law (including statutory provisions, if any) so as to enable the Plaintiffs to respond specifically and appropriately. Further the solicitors for the First and Second Defendants are required to do so pursuant to the Legal Profession Act 1976. Since the First and Second Defendants and their solicitors have not done so, the Plaintiffs are unable to respond thereto appropriately. I believe my solicitors will in any event be writing to the First and Second Defendants' Solicitors for details of the specific point of law that the First and Second Defendants' intend to raise (together with case law and statutory provisions, if any) during the hearing proper.

**[38]** As to this averment, the respondents merely responded as follows (the affidavit of Duar Tuan Kiat affirmed on 21 April 2011):

> 7. I refer to paragraph 8 Of the Plaintiffs' Affidavit (2) and state that I have been advised by my solicitors and verily believe that the Plaintiffs' directors do not have the locus standi to commence this action against the 2nd Defendant and I, as the receivers and Managers of the Plaintiffs,

because such action is tantamount to an interference of the functions of the Receivers and Managers and affecting the assets of the Plaintiffs.

**[39]** At last, now, for the first time the respondents attempted to give their reason for alleging that the appellants had no locus standi; the reason being:

> … such action is tantamount to an interference of the functions of the Receivers and Managers and affecting the assets of the Plaintiffs.

**[40]** Yet, in my view, the reason (or reasons) given above is still vague: the affidavit does not go on to explain *specifically* in what way the appellants' writ action is 'tantamount to an interference of the functions of the Receivers and Managers and affecting the assets of the Plaintiffs'.

**[41]** In my judgment, in view of the unfair and unethical conduct of the respondents in pursuing their setting aside application and the vagueness of the reasons given, the learned High Court judge ought to have simply dismissed the setting aside application with costs.

**[42]** It was further contended by the respondents before the High Court below and also before this court that the directors of the appellants, in taking out the writ action, have not provided an indemnity for costs. I also do not think that it is fair to raise this issue. The respondents have not raised this issue in the 'grounds' of the summons in chambers; nor was it raised in the supporting affidavits.

**[43]** Appeal allowed with costs; encl 4 remitted to High Court for hearing on the merits.

*Appeals in respect of both encls 13 and 4 dismissed.*

Reported by Ashok Kumar